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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

MAURICE SILVERSTEIN,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Is a night time search *per se* "unreasonable" under the Fourth Amendment, thereby requiring a showing of need above and beyond the initial demonstration of probable cause?

2. Does *Murray v. United States*, 108 S.Ct. 2529 (1988), require a remand to the hearing court where there was no finding that the police decision to seek a warrant was not prompted by the results of the earlier illegal entry or that the magistrate's decision to issue a warrant was not affected thereby?

No.

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PETITION FOR A WRIT OF CERTIORARI
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Parties to the Proceedings Below

Petitioner Maurice Silverstein seeks a Writ of Certiorari to review an order of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming a judgment of conviction entered in the Supreme Court of

the State of New York, New York County (Hon. Harold Rothwax).

Petitioner's co-defendant in the courts below was Lynn Lynn. There were no other parties to these proceedings.

TABLE OF CONTENTS

	PAGE
Question Presented For Review. . . .	i
Parties to the Proceedings Below . .	ii
Table of Authorities	v
Jurisdiction and Opinions Below. . .	1
Constitutional Provisions Involved .	1
Statement of the Case.	2
A. The Illegal Search	2
B. The Search Warrant	3
C. The Motion to Suppress . .	5
D. The State Appeals.	9
Reasons for Allowance of the Writ. .	14
A. The Court Has Never Considered Whether A Nighttime Search Should Be Within the Specific Proscriptions Of The Fourth Amendment	14
B. The New York Court of Appeals' Reliance Upon the Independent Source Exception is in Conflict With This Court's Decision in Murray v. United States. .	18
Conclusion	23
Appendices	

TABLE OF AUTHORITIES

CASES	PAGE
FEDERAL	
Camara v. Municipal Court, 379 U.S. 476 (1967).	17
Coolidge v. New Hampshire, 403 U.S. 443 (1971).	17
Gooding v. United States, 416 U.S. 430 (1974).	14,17, 18
Griswold v. Connecticut, 381 U.S. 479 (1965).	17
Jones v. United States, 357 U.S. 493 (1958).	13,15, 16,17
Murray v. United States, 108 S.Ct. 2529 (1988).	i; 10, 11,18, 19,22, 23
O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989) . . .	16
Stanford v. Texas, 379 U.S. 476 (1967).	17
United States v. Griffin, 502 F.2d 959 (6th Cir.), cert. denied. 419 U.S. 1050 (1974)	8

TABLE OF AUTHORITIES (Cont'd)

CASES — PAGE

STATE

People v. Crispell, 110 A.D.2d 926, 487 N.Y.S.2d 174 (3d Dept. 1985). 7-8

People v. Silverstein, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___ (1989) 1

CONSTITUTIONAL PROVISIONS

Amendment Four i;1,6

STATUTES

21 U.S.C. §879(a). 14

21 U.S.C. §1257(3) 1

Supreme Court Rules 17.1 15,21

Supreme Court Rules 20.1 1

New York Criminal Procedure Law §690.35(3)(a) (McKinney 1983). . . . 12,13

New York Criminal Procedure Law §690.45(6) (McKinney 1983) 12

New York Penal Law §120.05 (McKinney 1987). 5

New York Penal Law §135.25 (McKinney 1987). 5

Jurisdiction and Opinions Below

The as yet unpublished decision of the New York Court of Appeals in People v. Silverstein, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___, affirming the order (without opinion) of the Appellate Division, First Department, was entered on July 11, 1989.

Jurisdiction is conferred upon this court pursuant to 28 U.S.C. §1257(3) and Rules of the Supreme Court, Rule 20.1.

Constitutional Provisions Involved

Amendment Four

The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

A. The Illegal Search

At approximately 5:30 in the morning on October 7, 1986, police officers responding to St. Vincent's Hospital in Manhattan became aware, based upon the complaint of one Richard Baeyen, that he had been held captive in apartment 8 at 19 West 10th Street for approximately 17 hours and had just recently escaped. Police were also told by Baeyen that during that period he had been slashed in his right arm with a knife, thereby causing him to bleed. Baeyen never stated that his bleeding was so profuse as to run off his arm and thereby stain any part of the apartment.

Within minutes, the responding officers went to the building and obtained the key to apartment 8 from the building's owner after repeatedly knocking on the door and finding no one home. During their ensuing search of the miniscule one-room

residence "for people", which search lasted at least 10 minutes with the police walking "about" and "around furniture", police discovered, inter alia, blood stains on the carpet which were wet to their touch.

Detectives were quickly informed of these developments by the officers upon their return either to the precinct or the hospital. The detectives themselves soon went to interview the complainant, who had now changed his story twice. His second version, after earlier stating he had been there to sell insurance, was that he was accused by his captors of having taken money which he was to have laundered, and third, that he had been present at the apartment in order to participate in a narcotics transaction.

B. The Search Warrant

Conducting an investigation for approximately the next ten hours until about 7:00 P.M., during which time they

felt no urgent need to enter the apartment, detectives ultimately decided to seek issuance of a search warrant. Based upon references to "blood stains", which, while seen by police during the illegal search, had never been mentioned by the complainant; without indicating that the complainant had twice changed the reason for his presence in the apartment; and while averring, without any factual support, that no one had been in the apartment all day, detectives ultimately obtained a warrant for, inter alia, "blood samples". Furthermore, absent any request by the applicant, or any determination by the court that such was required, the warrant, which was issued after 9:00 o'clock P.M., also provided for "all hours" authority. It was later executed between 12:00 A.M. and 4:00 A.M. on October 8th -- approximately 18 hours after probable cause first arose.

C. The Motion to Suppress

As a result of the allegations of the complainant, as well as the items ultimately seized, petitioner Maurice Silverstein and a co-defendant, the residents of the apartment in question, were later charged under New York County Indictment Number 7480/86 with the crimes of Kidnapping in the First Degree (two counts) (New York Penal Law §135.25 [McKinney 1987]) and Assault in the Second Degree (three counts) (New York Penal Law §120.05 [McKinney 1987]).

In thereafter moving to controvert the warrant and suppress the resulting evidence, the petitioner contended, inter alia,

(a) that authority for night time execution was unsupported by any request therefore, any showing of need or any determination by the magistrate that such was

necessary, thereby rendering it "unreasonable" in violation of the Fourth Amendment; and

(b) that the prior illegal search hopelessly tainted the application and the warrant, and since there was no independent basis for the information contained in the affidavit, the warrant was likewise unconstitutionally infirm.

In the course of the hearing on the motion to suppress, the prosecution offered absolutely no evidence in furtherance of either of the following issues:

(a) Whether the police would have been "prompted" to seek a warrant were they not to have possessed the specific information, including the fact of wet blood stains, resulting from the

initial illegal entry into the apartment; and

(b) whether the magistrate was "affected" in his decision to issue the warrant by information obtained from the initial search which was specifically included in the affidavit.

Thereafter, in his findings of facts and conclusions of law (Appendix A), the hearing court determined that the original entry into the apartment was illegal. Thereafter, in addressing the issue of the night time warrant, it first cautioned that "[i]t must be recalled that this proscription against nighttime entry is statutory and is not of constitutional magnitude, see People v. Crispell, 110 A.D.2d 926 [487

N.Y.S.2d 174 (3d Dept. 1985)]" (A9).[1] Upon then simply determining that the search was judicially authorized and that the delay for 14 hours in obtaining the warrant was not arbitrary, the court upheld the nighttime search.

With respect to the second issue, the Court determined that since the allegations in the affidavit were the product of an independent source, the warrant was not tainted by the prior illegal entry. Being of the view that "[n]othing observed by the officers in this case upon this initial entry into the defendant's apartment was mentioned in the affidavit" (A10), the Court distinguished the case from United States v. Griffin, 502 F.2d 959 (6th Cir.), cert denied, 419 U.S. 1050 (1974) (id.),

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[1] Numerical references preceded by the letter "A" are to Appendix A; those preceded by the letter "B" are to Appendix B.

and held that the exclusionary rule was inapplicable.

Petitioner thereafter pleaded guilty to a charge of Attempted Kidnapping in the Second Degree. He received a sentence of three to six years' imprisonment.

D. The State Appeals

On appeal to the Appellate Division, that court affirmed the judgments without opinion in the face of petitioner's argument, inter alia, that the nighttime warrant was unconstitutionally unreasonable and that it was improperly tainted by the fruits of a prior illegal search.

Thereafter, upon further appeal to the New York Court of Appeals, petitioner again argued that the nighttime search herein, the basis for which was never established, aside from having been unconstitutionally unreasonable, was in complete derogation of controlling statutory prerequisites. It was thus contended that the warrant was

unjustified, thereby requiring suppression of all items seized. Petitioner also argued that in holding the initial police entry to have been unlawful but thereupon ruling that an independent source for the issuance of the warrant existed based upon the complainant's information, the hearing court completely minimized the extent of the police misconduct and misapplied controlling case law. It was thus further urged that notwithstanding the hearing court's (unfounded) determination that nothing observed during the illegal search had been found included in the affidavit, the court's conclusions, on their face, failed to satisfy the "independent source" exception as explained in this court's recent decision in Murray v. United States, 108 S.Ct. 2529 (1988).

A majority of the Court of Appeals thereafter affirmed the order of the Appellate Division, merely holding --

without reaching the constitutional issue -- that the warrant, which was not signed until after 9:00 P.M., directed the police to make an immediate search. As did the hearing court, it also placed reliance on the determination that such immediate search was "reasonably necessary because the whereabouts of a violent-crime suspect was still unknown, the potential loss of evidence was a real concern, and the recovery of that evidence was essential to the continued progress of the investigation" (Appendix B at B1-B2).

With respect to petitioner's contentions that the hearing court's upholding of the warrant was in flagrant violation of the dictates of Murray v. United States, supra, the Court of Appeals did not even address the question. All it held was that the hearing court's factual determination that the search warrant application "was based solely on

information obtained prior to and independent of the initial [illegal] entry [wa]s supported in the record by evidence of the victim's account of the crime and the crime scene... [citations omitted]" (B2). The Court of Appeals did not -- and could not -- explain how this could be so, when the complainant never stated that he had bled on anything while he had been in the apartment.

Dissenting, Judge Titone forcefully argued that in addition to the clear violation of the governing New York statutory scheme by the absence of either a request for nighttime authority, a showing of need, or a special determination by the magistrate of its necessity (see New York Criminal Procedure Law §§690.35(3)(a) and 690.45(6) [McKinney 1983]), the majority relied on facts that had never been placed before the magistrate and hence, based its decision on "post-hoc rationalization". As

to the remedy of suppression, Judge Titone stated the following:

> Similarly, I would hold that violations of statutes like CPL §690.35(3)(a), which could have no other logical purpose than to supplement or elaborate upon the basic constitutional privacy guarantee (see, generally, Jones v. United States, 357 U.S. 493, 498 ["it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home"]), should also result in suppression... (citations omitted).

(B6-B7).

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court Has Never Considered Whether A Nighttime Search Should Be Within the Specific Proscriptions Of The Fourth Amendment

Surprisingly enough, although this Court has clearly broached the question, it has never squarely confronted whether in addition to the normal probable cause requirements attending an affidavit in support of the search warrant, there should be a further showing that such would likewise not be "unreasonable" in the event nighttime authority is sought. Accordingly, since even in Gooding v. United States, 416 U.S. 430 (1974), wherein amidst this Court's interpretation of 21 U.S.C. §879(a) "...this constitutional question [wa]s not presented... and... [therefore was] not... resolved...", 416 U.S. at 465 [Marshall, J., dissenting], the instant matter presents the precise question which

might have been, but was not, addressed in that case.

Here, the New York Court of Appeals, in rejecting, by ignoring, that part of petitioner's argument which urged that nighttime execution of search warrants requires additional justification, has apparently put itself squarely in conflict with at least the most recent federal Court of Appeals decision to address the question. See, Supreme Court Rules 17.1(b). Moreover, it has also decided an "important question of federal law", by its silence, "which has not been, but should be, settled by this Court". Id., Rule 17.1(c).

Specifically, ever mindful of Justice Harlan's admonition that "...it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home...", Jones v. United States, 357 U.S. 493, 498 (1958), the

United States Court of Appeals for the Tenth Circuit recently concluded in O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989), upon elaborately tracing the history of and the "early adversion to nighttime searches" since well before the founding of the republic, that the search of a private home at 10:00 P.M. "without a nighttime endorsement of the warrant was unreasonable under the Fourth Amendment". 875 F.2d at 1475. Although here, unlike in O'Rourke, the magistrate did authorize such a nighttime search, just like in O'Rourke and Jones v. United States, supra, there was absolutely no request for, nor any showing made in support of, such authority.

As Justice Marshall has pointedly observed upon tracing prior decisions of the Supreme Court,

> [t]his court has consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater

> than that produced by an ordinary search.

Gooding v. United States, supra, 416 U.S. at 463 (Marshall, J., dissenting, citing, Jones v. United States, supra; Coolidge v. New Hampshire, 403 U.S. 443 [1971]; and Griswold v. Connecticut, 381 U.S. 479 [1965]). Further, as Justice Marshall also noted, given Justice White's earlier pronounced in Camara v. Municipal Court, 387 U.S. 523 (1967) that "the quantum of probable cause required for issuance of an inspection warrant must be determined in part by the reasonableness of the proposed search",

> [i]n some situations -- and the search of a private home during nighttime would seem to be a paradigm -- this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause. Cf. Stanford v. Texas, 379 U.S. 476, 485-486 (1965).

416 U.S. at 465 (Marshall, J., dissenting).

As noted, in Gooding, given the arguments advanced therein and the statutory construction involved, the precise question raised in this petition was not reached. Nonetheless, it is now squarely presented and in light of its obvious constitutional significance, it should be quickly accepted for the court's review.

B. The New York Court of Appeals' Reliance Upon the Independent Source Exception is in Conflict With This Court's Decision in Murray v. United States

In Murray v. United States, 108 S.Ct. 2529 (1988), this Court cautioned that knowledge which had been earlier acquired illegally did not, ipso facto, necessitate exclusion if it were "also acquired at the time of the entry pursuant to the warrant...", 108 S.Ct. at 2535. It was thus explained that "...if that later acquisition [of knowledge] was not the result of the earlier entry, there is no

reason why the independent source doctrine should not apply", id. However, the Murray court, in remanding that case for findings to be made by the District Court, placed pre-eminent importance on the construction of the record at the hearing. Holding that because the determination of the necessary facts had not been made by the District Court insofar as finding that "...the agents would have sought a warrant if they had not earlier entered the warehouse", id. at 2536, the Court enunciated the constitutionally requisite determination. As therein stated:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry... [footnote omitted], or if the information obtained during that entry was presented to the

> magistrate and affected his decision to issue the warrant. Id. at 2535-2536.

Here, just as in Murray, the hearing court found that the police "did not include in their application for a warrant any recitation of their observations", 108 S.Ct. at 2536, earlier in the apartment. Yet, just as in Murray, "[i]t did not, however, explicitly find that the... [police] would have sought a warrant if they had not earlier entered the... [apartment]". Id. Thus, the hearing court failed in its obligation to construct a full and complete record, the absence of which caused the very remand in Murray. This is in addition to the record unequivocally reflecting that the magistrate's decision to issue the warrant had to have been "affected" by the "blood samples" reference, which, never having been stated by the complainant, could only have come

from the illegal observations (thereby alone requiring suppression herein).

It follows that in upholding the warrant based upon the independent source exception, where the record is simply silent on what the police would have done if they had not possessed information which could only have come from an antecedent illegal search, the New York Court of Appeals has decided this case squarely "in conflict with applicable decisions of this court". Supreme Court Rules 17.1(c). Indeed, even were it so -- which it is not -- that, as the Court of Appeals majority and the hearing court concluded, "the warrant application was based solely on information obtained prior to and independent of the initial entry..." (Appendix B at B2), it remains undisputed that there is simply no further proof or finding in the record, and certainly no "clear inference", 108 S.Ct. at 2536,

drawable, that the earlier information did not "prompt" the later application. Accordingly, since Murray surely requires such a finding, here again a remand must be ordered, upon plenary review of this case, if this Court's constitutional edicts are to be ascribed their due regard. Alternatively, the matter should simply be remanded to the Court of Appeals for reconsideration in light of Murray, supra.

CONCLUSION

The petition for a Writ of Certiorari should be granted; in the alternative, the matter should summarily be remanded to the New York State Court of Appeals for reconsideration in light of Murray v. United States.

Dated: New York, New York
August 28, 1989

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK, PART 56

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAURICE SILVERSTEIN
LYNN LYNN,

Defendants.

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100 Centre Street
New York, New York
April 7, 1987

(Appearances same as previously noted.)

* * *

THE COURT: This is the case of the People versus Silverstein and Lynn.

When we concluded business yesterday, the Court had reserved decision on the hearing on the motion to suppress the evidence obtained from Apartment 8 at 19 West 10th Street. I will now indicate to you what my findings of fact and my conclusions of law are.

With regard to the findings of fact, the Court finds that Police Officers Bendoraitis and Balestrieri were on radio motor patrol on October 7, 1986, and they responded to St. Vincent's Hospital at approximately 6 a.m. to investigate a complaint of assault and unlawful imprisonment from a complainant, Mr. Baeyen, whom they found in the emergency room of the hospital.

I find that the complainant stated to the officers that on October 6th at about noontime at apartment 8 at 19 West 10th Street,

that he was jumped by three males in the defendant Lynn's apartment and he was beaten with a buckle, a stun gun was used on him, that his arm was slashed and that he was held for 17 hours in that apartment. Thereafter he was brought outside by his captors and he escaped from them while on the street and immediately went to St. Vincent's Hospital.

That interview lasted approximately 15 minutes. Thereafter Sergeant Cunningham and his associate, Police Officer Gossett were called and all four police officers went to apartment 8 at 19 West 10th Street at approximately 6:30 in the morning.

When they got to that apartment, they banged on the door. There was no response and they heard no noise inside the apartment. One of their number then went downstairs to get the key from the owner of the building and at about 6:40 a.m. with the key, they went into the apartment to look for people inside.

While inside the apartment, for what I find to have been approximately five to ten minutes, the officers saw what appeared to be blood stains in front of the couch. The apartment is a relatively small apartment and at the time that they entered, it was in disarray and messy and when the officers left the apartment, they returned the keys to the owner.

I find the officers then went back to the hospital and spoke to Detective Coughlin. They told Detective Coughlin about the fact that they could get the keys to the apartment from the owner. They told Detective Coughlin that no one was in the apartment and that blood stains were on the floor.

Detective Coughlin was at the hospital at that time and interviewed the complainant for approximately 15 to 20 minutes at approximately eight a.m. in the morning along with his partner, Detective Ambrozaitis.

I find that Mr. Baeyen told Detective Coughlin at that time that he had been held in apartment 8 at 19 West 10th for a long

period of time, that he had been beaten and cut and that a stun gun had been used upon him, that he had been cut with a knife and that the people who held him tried to put him in a steamer trunk and that he had been handcuffed while in the apartment.

I find that Mr. Baeyen named these two defendants, Mr. Silverstein and Ms. Lynn, as participants in that event.

He further told the detective that he had gone to sell insurance to the defendant Lynn. He indicated to the detective that he believed that he had been jumped over some money he was accused of taking growing out of a money laundering scheme on the west coast. The detective noticed that the complainant was bruised, that his eyes were bumpy and black. There was a cut or a gash on his right arm and he was bleeding.

Complainant said he had an attache case left in the apartment with his insurance business.

The detective left the hospital and with his partner went to 19 West 10th Street and spoke to the owner of the building, Mr. Raaberg. The owner of the building told the detective at about 6 a.m. he heard heavy thumping on the stairway which was, in the owner's view, unusual. He said, that is the owner said to the detective, that after he heard the thumping he was aware that police officers came and asked him for the key to apartment 8. They went upstairs and returned a short time later and gave him back the key.

The owner told the detective that he had seen the defendant Lynn the night of October 6th in front of the building with her son and two others at approximately 8 or 8:30 p.m.

The detective then canvassed the building without result.

I find that he does not get the key to the apartment and did not enter apartment 8 at that time. I further find that the detective, before leaving 19 West 10th Street, told Mr. Raaberg to call the police if anybody from apartment 8 did arrive, and the owner

did later phone the police officers regarding the arrival of the defendant Lynn.

After his canvas at 19 West 10th Street, the detective went back to the station for further investigation at approximately 9 to 9:30 a.m. and later did field investigation for approximately four hours.

I further find that the detective at around noontime again interviewed Mr. Baeyen who at that time spoke of his drug involvement with the defendant.

After his field investigation, he returned to the station house where he continued his investigation. Some time between seven p.m. and eight p.m. he called A.D.A. Nunez regarding the obtaining of a search warrant and spoke to her and about seven p.m. a police officer was posted at 19 West 10th Street to apprehend the defendants if they arrived.

Thereafter the detective went to the courthouse where he again saw A.D.A. Nunez. A warrant was applied for an obtained. The magistrate signed the search warrant, which is now in evidence.

After the warrant was obtained, the detective called other police officers and went to 19 West 10th Street. The detective at that time obtained the key from the owner, Mr. Raaberg, the key to apartment 8.

I find that he returned to 19 West 10th Street sometime around midnight. The warrant, parenthetically, had authorized a nighttime entry and that six or seven detectives entered into the apartment. Among those detectives were officers from the Crime Scene Unit and that the officers were in apartment 8 for approximately three to four hours. That would be from twelve a.m. to three or four a.m.

That while in the apartment, they recovered a steamer trunk, sections of upholstery of the couch and the rug, which I believe

were blood stains, handcuffs, a cassette tape recorder from an answering machine and a paper with Baeyen's name on it.

Subsequently they return with all of the items listed except for the tape recorder was filed on October 24, 1986, and an amended return was filed on November 17th regarding the tape recording. The detective testified, and I credit that he had forgotten about the tape and then found it in his locker after speaking to A.D.A. Nunez.

When the search was completed all of the officers left the apartment and returned the key to the owner. Again the detective asked the owner to call the police if he saw the occupants of apartment 8 and as I indicated, the owner did later call to advise the defendant Lynn was in her apartment.

Those are my findings of fact.

Now, there are a whole list of issues raised by the defendants in their efforts to suppress the evidence obtained as a result of that entry.

Firstly, the defendants contend that the entry without a warrant by the four police officers at about 6:30 in the morning was illegal, one, because it was without a warrant and, two, because they claim there were no exigent circumstances justifying a warrentless entry.

The Supreme Court has not adopted any criteria for determining the existence of exigent circumstances but other courts have given us some guidelines.

Although not to be taken as a rigid formula, the following factors should be considered in determining whether exigent circumstances exist. One, the gravity or violent nature of the offense, two, whether there is reason to believe the suspect is armed, three, whether there is a clear showing of probable cause. Four, whether there is a strong reason to believe the subject is in the premises being entered, five, the likelihood the suspect will escape if not

swiftly apprehended and, six, the peaceful circumstances of the entry, see *United States* v. *Campbell*, 581, Fed 2d, 22 at 26; *Doorman* v. *United States* 435, Fed 2d, 385 at 392 to 393; *People* v. *Gordon*, 110 App. Div 2d, 778 at 780; and *People* v. *Martin* 50 N.Y. 2d, 1029 at 1031, note two.

All of these factors seem to apply in this case except the fourth, that is the one that indicates there is strong reason to believe the suspect is in the premises. It's clear that the crime was a serious and a violent one, there is reason to believe, based on the complainant's statements, that the suspects were armed, it seems to me there was a clear showing of probable cause, the likelihood that a suspect will escape if not swiftly apprehended as here as in other cases of a like nature, and it's clear that there was peaceful circumstances of entry. I don't find that there was strong reason to believe that the suspect was in the premises at the time that the police entered the premises. Here there was certainly a reasonable possibility that the suspects might have been there. One or two of them actually lived in the apartment. The time span between the escape of the complainant and the police response was relatively brief. Certainly a reasonable possibility. The police were certainly right to investigate and arguably there were exigent circumstances, but based on the fourth factor, that is that there is a strong reason to believe the subject is in the premises being entered, I will hold that there were not exigent circumstances in this case. I will find there were no exigent circumstances and, therefore, the entry by the police officers into the apartment at 6:30 a.m. to search for persons in the premises was illegal.

We turn then to the issue of whether there was a valid search warrant. Under that issue a number of separate claims have been raised and I will deal with them in what I hope is a logical order.

First, we deal with the issue of reliability of the informant and the issue of probable cause. A warrant for the search of the defendant's premises was based I find upon probable cause. An identified and locatable informant set out in detail his personal

observation of criminal activity on the defendant's premises and indicated how he had obtained the information. The informant was a private citizen reporting a crime without expectation of private gain. Indeed, he was himself the victim of the crime and such information should be relied upon by the police and the courts. The requirement of probable cause is satisfied where the issuing officer has knowledge derived from a reasonably trustworthy source of facts and circumstances sufficient in themselves to warrant a man of reasonable caution in the belief that a crime has been committed. Here the informant was named, the information involving the defendants in criminal activity was set out in detail, as was the means by which the informant acquired the information. The informant related criminal activity that he had personally observed and heard on the premises in question. The information furnished was not based upon casual rumor, surmise, suspicion or general reputation of the defendants.

In addition, the informant's name and residence were disclosed to the magistrate. The Court knew who the informant was and how he came by the information and exactly what he had to offer. The police had the informant's name and address and could track the informant down if necessary. The informant would be subject to civil damages for malicious prosecution if he were to furnished false information causing a person's premises to be unlawfully searched.

Additionally in this case, Detective Coughlin observed the informant in the hospital and his appearance and his wounds corroborated his statements.

I find that the informant was reliable and there was probable cause.

The second issue relates to whether or not misrepresentations were made in the search warrant application. Here the defense raises two issues. One, a failure to disclose to the issuing magistrate a change in the statements made by Mr. Baeyen initially to the detective and thereafter. First he indicated it was a

money laundering scheme and, secondly, he indicated there was drug involvement. And the second misrepresentation, so to speak, is related to the last line of the detective's affidavit or part of that last sentence which says, "That since that time he," meaning the owner, "has kept watch over said apartment and that no one has exited or entered said apartment."

These two alleged misrepresentations on a search warrant application were not fatal to the validity of the warrant where, as I find, neither of those conditions was materially misleading, nor when they intended to mislead, nor were they essential to the application and other information provided in the warrant application was sufficient without these allegations to show probable cause for the search. I do not find, therefore, that the failure to disclose the changes in the complainant's version as to the reasons he was attacked or the motive for his attack or the nature of the relationship between the parties, was such as to invalidate the warrant and I do not find that while the last line of the affidavit is strictly true, that it was not a material misrepresentation. The officers asked the owner to advise them of the return of any of the parties who lived in the apartment and , in fact, at some later time the owner did just that. These were not, in my view, material misrepresentations going to the validity of the warrant.

The next issue raised by the defense attorneys goes to the authorization in the warrant for nighttime execution and the fact that there was nighttime execution. Here Detective Coughlin delayed from eight a.m., when he spoke with the victim, until about seven p.m. to apply for a search warrant for the premises. In the interim it appeared that a search was under way for the suspects, one of whom at least resided at the apartment. The landlord had been asked to notify the police in the event the occupants were seen. It was not unreasonable for the police, having been unsuccessful in locating the suspects, to delay manifesting their presence at the crime scene apartment of the suspect in the hope that the suspect would return. The tactic having failed, the police

posted a guard in the building lobby at seven p.m. and went to secure a warrant.

The issuing magistrate authorized the search of the apartment extending beyond the usual nine p.m. terminus, as it was apparent under the circumstances that the search could not be completed during that time, compare *People* v. *Vara*, 117 App. Div. 2d, 1013.

This court finds that it was reasonable for the police to seize evidence from the premises before it was removed by the suspects or persons acting on their behalf.

It must be recalled that this proscription against nighttime entry is statutory and is not of constitutional magnitude, see *People* v. *Crispell*, 110 App. Div. 2d, 926.

Here the nighttime search was judicially authorized. The delay was not arbitrary but was reasonable under the circumstances, compare *People* v. *Miller*, 109 Misc. 2d 276, and concern for the preservation of the evidence was real in light of the suspects' control over the premises, see also *People* v. *Arnou* 58 N.Y. 2d, 27; and *People* v. *Rose*, 31 N.Y. 2d, 1036; and see also *People* v. *Acevedo*, 128 Misc. 2d, 405, which in that case found a nighttime search illegal but upheld the search on grounds of inevitable discovery. The Acevedo court found that it was not necessary to order suppression of contraband seized in the execution of the warrant since the same police team would have inevitably executed the warrant after six a.m. and would have recovered the same contraband.

I find that the nighttime search does not provide a basis for invalidating this warrant.

In short, the warrant appears to be a valid warrant unless it has been tainted by the illegal warrantless search of the four police officers at 6:30 in the morning on October 7th. In that regard, the leading case is *People* v. *Arnou*, 58 N.Y. 2d, 27, which held that the evidence seized pursuant to a valid search warrant obtained

after the police illegally entered the defendant's apartment should not be suppressed where the search warrant was obtained on the basis of information gathered from lawful sources prior to and independent of the illegal entry. Where the evidence sought to be suppressed is the product of independent source entirely free and distinct from police activity, it should be admissible and not subject to the per se rule of exclusion based solely on the unlawful conduct.

Nothing observed by the officers in this case upon their initial entry into the defendant's apartment was mentioned in the affidavit. We are not confronted with a situation where the police have illegally entered a home, discovered contraband and then sought a search warrant in an attempt to validate the seizure of the fruits of the illegal entry, as was the case in *United States* versus *Griffin*, 502 Fed 2d, 559.

In determining whether or not evidence seized pursuant to a search warrant based entirely on information obtained prior to and independent of the initial warrantless entry, should be suppressed, we are guided by the realization that the exclusionary rule is a judiciary created pool designed to effectuate rights guaranteed by the fourth amendment that when applied, it exacts a heavy price. Applying the independent source rule to the facts of this case, it would be inappropriate to order suppression of the evidence which was lawfully seized pursuant to a valid search warrant based solely on the information obtained prior to an independent of the illegal entry. The police officers entered the defendant's apartment not for the purpose of searching for and seizing evidence, but to see whether or not the defendants were in the apartment. Only after the warrant arrived, did the police search the apartment. I should say, only after the warrant was obtained, did the police search the apartment.

Since there is not the slightest hint that the search warrant was in any way tainted by the illegal entry or that the police exploited the entry in an effort to obtain evidence, I hold that the

evidence seized is not the fruit of the poisonous tree and that the exclusionary rule is, therefore, inapplicable in this case.

Where the evidence sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity, it should be admissible and not subject to a per se rule of exclusion based solely on the unlawful conduct.

As a matter of policy, it is inappropriate to suppress evidence lawfully seized simply because the police have blundered in a way wholly unrelated to the seizure of that evidence.

Further, in cases where a search warrant was issued based in part on illegally obtained information, courts have held that evidence seized pursuant to such warrants need not be suppressed if there was additional information sufficient by itself to constitute probable cause derived from sources independent of the illegal activity upon which the decision to issue the warrant was based, see *Franks* v. *Delaware*, 438 U.S. 154; *People* v. *Plevy*, 52 N.Y. 2d, 58; see also *People* v. *Lee*, 58 N.Y. 2d; 771 and *People* v. *Harris*, 62 N.Y. 2d, 706.

Now, in this case, the people consent to the—properly consent to the suppression of the tape cassette and it will be suppressed.

The issue of the delay in filing the return or returns, was not raised in oral argument by defense counsel. In any event, this is a ministerial failure and does not provide a basis for suppression, which is presumably the reason why defense counsel did not raise it.

The motion to suppress is denied except for the suppression of the tape cassette, and the foregoing is the opinion and decision and order of the Court.

Why don't you come up.

* * *

APPENDIX B

MEMORANDUM
This memorandum is uncorrected and subject to revision before publication in the New York Reports.

State of New York Court of Appeals

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1 No. 156

THE PEOPLE &c.,

Respondent,

v.

MAURICE SILVERSTEIN,

Appellant.

THE PEOPLE &c.,

Respondent,

v.

LYNN LYNN,

Appellant.

Mark M. Baker & Barry I. Slotnick, NY City, for appellant Silverstein.

Linda Fraser, NY City, for appellant Lynn.

Robert M. Morgenthau, DA, NY County (Patricia Curran of counsel) for respondent.

MEMORANDUM

The orders of the Appellate Division should be affirmed.

Defendants argue that the night time search was invalid under CPL 690.35(3) and 690.45(6) and, therefore, that the fruits thereof should have been suppressed. We disagree. The warrant

itself expressly authorized the night time entry, it was not signed until after 9 p.m., and it directed the police to make an immediate search; additionally, an immediate search was reasonably necessary because the whereabouts of the violent-crime suspects was still unknown, the potential loss of evidence was a real concern, and the recovery of that evidence was essential to the continued progress of the investigation. Under these circumstances, it was not fatal to the validity of the warrant, or of the ensuing search, that the application did not explicitly request permission for a night time entry (*see, People* v. *Arnau*, 58 NY2d 27, 38, *cert denied* 468 US 1217; *see also, People* v. *Rose*, 31 NY2d 1036).

Defendants' contention that the search was tainted by the initial warrantless entry must also fail. The undisturbed factual determination of the suppression court that the warrant application was based solely on information obtained prior to and independent of the initial entry is supported in the record by evidence of the victim's account of the crime and the crime scene (*see, People* v. *Arnau, supra*, at 27; *People* v. *McCray*, 51 NY2d 594, 601). We have considered defendants' other contentions and find them to be without merit.

People v. Silverstein

People v. Lynn Lynn

Case No. 156

Titone, J. (dissenting):

I dissent. The issue in this case is not, as the majority suggests, whether an explicit request for such additional relief is required before a magistrate may include authorization for a nighttime entry in an otherwise validly issued search warrant. Rather, the question is whether such authorization may be given despite the absence of allegations in the warrant application to satisfy the statutory requirements. Since I conclude that it may not, I cannot concur in the majority's decision to uphold the denial of defendants' suppression motions and affirm their convictions.

CPL 690.35 (3) (a) provides that an application for a search warrant may contain "[a] request that the * * * warrant be made executable at any time of day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith." Under CPL 690.45 (6), a search warrant must contain "[a] direction that the warrant be executed between the hours of 6:00 A.M. and 9:00 P.M., or, where the court has specially so determined, an authorization for execution thereof at any time of the day or night." Presumably, the Legislature intended that such "any time" authorization be granted only when the "reasonable cause" standard set forth in CPL 690.35 (a) (i)-(ii) is satisfied by the allegations in the warrant application (*see*, Bellacosa, Practice Commentary, McKinney's Consol Laws, Book 11A, CPL 690.35, at 380 ["[i]f the applicant wishes to have either of two exceptions author-

ized, the application must justify them specially, e.g., a nighttime execution or a no-knock entry"]).

In this case, it is undisputed that the warrant application contained no allegations at all indicating either that the warrant could not be executed between 6:00 A.M. and 9:00 P.M. or that the property sought might be removed or destroyed "if not seized forthwith." Indeed, the only allegation that even remotely pertained to exigency suggested the contrary. [1]

Despite the absence of any facts before the issuing magistrate that would support an "any time" authorization, the majority has approved the warrant and the ensuing nighttime search on the grounds that the warrant was not signed until after 9:00 P.M., the whereabouts of the suspects were still unknown, the potential loss of evidence was "a real concern," and "the recovery of evidence was essential to the continued progress of the investigation." However, these facts were not before the magistrate who issued the warrant and therefore cannot logically be relied upon to validate the magistrate's decision. Indeed, by relying on such post hoc rationalization, the majority has, in effect, subverted the principles underlying the warrant requirement itself.

In reviewing the validity of judicially issued warrants, we have always placed great emphasis on the facts that were actually before the magistrate (*e.g.*, *People* v. *P.J. Video, Inc.*, 68 NY2d 296, 305-307; *People* v. *Hanlon*, 36 NY2d 549). The operative principles are simply stated. To encourage the use of warrants, which involve the interposition of a detached and neutral magistrate's judgment, appellate courts are instructed to afford deference to the magistrate's determinations (*e.g.*, *People* v. *Elwell*, 50 NY2d 231; *People* v. *Hanlon*, *supra*, at 558-559; *see*, *People* v. *Johnson*, 66

[1] The officer who applied for the warrant averred that the owner of the building in which the apartment to be searched was located had given investigating police officers a key to the apartment earlier in the day, had since "kept watch over said apartment" and had given assurances that "no one has exited or entered said apartment."

NY2d 398, 406). "The duty of an appellate court, reviewing a magistrate's determination, is to do no more than insure that there was a substantial basis for the magistrate's conclusion * * *" (*People* v. *Johnson, supra,* at 405). In this scheme, the requirement that all of the necessary facts actually be placed before the magistrate serves the twin functions of assuring that the necessary determination is made by a judicial rather than a law enforcement officer and furnishing an "objectively verifiable" basis for review (*see, People* v. *P.J. Video, Inc., supra,* at 307; *People* v. *Potwora,* 48 NY2d 91, 94; *People* v. *Hanlon, supra,* at 559; *see, also, People* v. *Tambe,* 71 NY2d 492). By dispensing with that requirement and substituting its speculative theories for the actual motives of the officers, the majority has effectively circumvented the entire warrant application process, thereby defeating its salutary purpose.

In support of its holding, the majority relies principally upon *People* v. *Arnau* (58 NY2d 27, 38), in which the court upheld "an any time" search authorization despite the absence of a request or specific allegations in the warrant application.[2] In that case, we stated only that "[s]ince the challenged warrant was signed at approximately 8:30 P.M. and defendant's apartment was approximately a 30-minute drive from the courthouse, the finding below that there was reasonable cause to believe that a 24-hour warrant was necessary is amply supported by the evidence in the record" (*id.*). *Arnau* is clearly distinguishable from this case, however, since in *Arnau* there were police officers holding the suspect and his wife handcuffed in their apartment and waiting for their colleagues to bring back a warrant at the time the application was

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[2] The majority has also cited *People* v. *Rose* (31 NY2d 1036), in which this court affirmed an Appellate Division order which upheld a search conducted pursuant to special judicial "any time" authorization. Since we affirmed without opinion, the basis for our decision in *Rose* cannot be settled with any degree of certainty. Nonetheless, it cannot be ignored that, as the dissenting opinion makes clear, the warrant application, which expressly sought no-knock authority, included at least some allegations indicative of exigency (*see, id.,* at 1037-1039 [Jones, J., dissenting]). Accordingly, *Rose* is not adequate authority for the holding in this case, where no indicia of exigency at all are present.

made. While this court's opinion did not say as much, this circumstance, which may well have been known to the issuing magistrate, was, in all likelihood, the determinative factor.

In any event, whatever the underpinnings of the brief reference to this issue in *Arnau*, it cannot seriously be argued that the decision stands for the startling proposition that a warrant containing an "any time" search authorization may be issued even when the warrant application does not establish the requisite "reasonable cause to believe that (i) [the warrant] cannot be executed between the hours of 6:00 P.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith" (CPL 690.35[3][a]). Such an interpretation of the holding in *Arnau* would, quite simply, nullify the statute as well as the underlying legislative policy to impose specific restrictions on nighttime searches, a policy which has been in existence since at least 1881 (*see*, L 1881, ch 442; *cf.*, *People* v. *Taylor*, NY2d [slip op, at 5] ["conduct cannot be considered as in 'substantial compliance' with statutory standards when the legislative purposes in adopting the statute have not been met"] [June 8, 1989]).

Finally, contrary to the People's argument, the remedy of suppression is appropriate notwithstanding that the flaw in the warrant is derived from a statutory rather than a constitutional command. Clearly, CPL 710.20, which directs suppression when tangible property was obtained "by means of an unlawful search and seizure," is not, by its terms, limited to constitutional wrongs. Moreover, we have recently held that violations of statutes that exist to implement constitutional guarantees should be remedied by suppression (*People* v. *Taylor, supra*, slip op, at 8; *see, also, People* v. *Crandall*, 69 NY2d 459 [directing suppression hearing for violation of CPL 690.40 [3]). Similarly, I would hold that violations of statutes like CPL 690.35 (3) (a), which could have no other logical purpose than to supplement or elaborate upon the basic constitutional privacy guarantee (*see, generally, Jones* v. *United States*, 357 US 493, 498 ["it is difficult to imagine a more severe

invasion of privacy than the nighttime intrusion into a private home"]), should also result in suppression (*cf.*, *People* v. *Sampson*, 73 NY2d 908 [suppression not available for violations of statute governing out-of-state arrests]; *People* v. *Harris*, 48 NY2d 208 [suppression not available for violation of CPL 140.50[3]).

For all of these reasons, I would reverse the orders of the Appellate Division, direct the suppression of the evidence discovered as a result of the execution of the warrant, vacate defendants' guilty pleas and, finally, remit for further proceedings on the indictments. Inasmuch as the majority has instead determined that the orders appealed from should be affirmed, I must, respectfully, dissent.

* *

Orders affirmed in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock and Bellacosa concur. Judge Titone dissents and votes to reverse in an opinion.

Decided July 11, 1989